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No. 387

In the Supreme Court of the United States

OCTOBER TERM, 1958

DELTA AIR LINES, INC., PETITIONER

v.

W. SAM EDWARDS, Administrator c. t. a. of the Estate of MARION H. ALLEN, Deceased, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
MELVA M. GRANEY,
JOSEPH KOVNER,
Attorneys,
Department of Justice,
Washington 25, D. C.

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OPINIONS BELOW

The opinion of the District Court (R. 77-81) is reported at 150 F. Supp. 589. The opinion of the Court of Appeals (Pet. 15-20) is reported at 255 F. 2d 501.

JURISDICTION

The judgment of the Court of Appeals was entered on May 23, 1958. (Pet. 20; R. 154.) A petition for rehearing was denied on June 24, 1958. (R. 165.) The petition for a writ of certiorari was filed on September 19, 1958. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether, as the court below held, the taxpayer's right to additional pay for transportation of air mail in 1940 did not become final and definite in amount, and hence did not accrue, until the determination in 1942 of fair and reasonable compensation therefor by the Civil Aeronautics Board.

STATUTES INVOLVED

The relevant provisions of Sections 41 and 42(a) of the Internal Revenue Code of 1939 and Sections 405(a), 406(a) and (b) of the Civil Aeronautics Act of 1938 are set forth in the Appendix, *infra*, pp. 9-12.

STATEMENT

The facts as stipulated (R. 46-55), found by the District Court (R. 77-81) and restated by the Court of Appeals (Pet. 15-20), may be summarized as follows:

Delta Air Lines, Inc., an air carrier of persons, property and mail, is an accrual basis taxpayer. Beginning in 1934, it transported mail over Route 24 between Texas and South Carolina and intermediate points under a contract with the Postmaster General. (R. 47, 50.) In 1936, the base rate for the carriage of this mail by taxpayer was fixed by the Interstate Commerce Commission at 29 cents per pay mile. (R. 51, 53.) In June, 1938, the Civil Aeronautics Act of 1938 was enacted and taxpayer was issued a certificate of public convenience and necessity by the Civil Aeronautics Authority. (R. 50.) Section 405(a) of the Act provided that the prior contracts for mail carriage should be continued in effect until the issuance of a certificate of public convenience and necessity by the Authority; and that thereafter, until the Authority fixed a rate under

Section 406 of the Act (Appendix, *infra*, pp. 11-12), the carrier would be paid the rate previously fixed by the Interstate Commerce Commission. (R. 51.) Section 406(a) of the Act authorized the Authority to fix and determine "the fair and reasonable rates" for such compensation upon its own initiative or upon a petition of the Postmaster General or an air carrier. (R. 52.)

On December 1, 1939, the Authority, acting on its own initiative, instituted proceedings to determine whether or not the rates being paid to taxpayer for the transportation of mail were fair and reasonable. (R. 52.) The taxpayer did not request any new rates for Route 24, but took the position that, since the Authority instituted the proceeding, it should fix the rates based on the service rendered. (R. 53.) During the pendency of this proceeding, the taxpayer continued to accrue and receive pay for its mail transportation at the rate previously fixed by the Interstate Commerce Commission, in accord with its consistent practice of accruing pay at the then current rates for mail transported in each taxable year. (R. 52-53, 54.) On January 29, 1942, the Civil Aeronautics Board, successor to the Authority, issued its order (R. 53) and opinion (R. 94-131) fixing a rate of thirty-one cents per pay-mile for the period beginning December 1, 1939, and terminating July 14, 1941 (R. 53). Under this order, the amount of taxpayer's additional mail transportation pay for its fiscal year ending June 30, 1940, was $43,931.86. Payment of this amount was received by the taxpayer during its fiscal year ending June 30, 1942, and was included as income in its income tax return for that year. (R. 53-54.)

The question in this case arises in connection with the taxpayer's excess profits tax liability for 1944 and

1945. In filing its income and excess profits tax returns for those years, the taxpayer did not claim that the additional mail pay accrued in 1940 for the purpose of computing its 1940 base period income credit, but for other reasons reported no excess profits tax liability. (R. 47, 51.) Later, in June, 1948, upon an examination of taxpayer's excess profits tax liability for 1944 and 1945, the Commissioner of Internal Revenue found that the taxpayer was liable for excess profits taxes and that there was a deficiency. (R. 49.) The amount of the deficiency was absorbed by unused tax credits and an operating loss carry-back but the interest on the deficiency was due and outstanding. (R. 49.) At this point, taxpayer contended that it had no liability for excess profits taxes in 1944 and 1945 and the interest thereon, on the ground that the additional mail pay properly accrued in 1940. (R. 22.) The amounts involved are stipulated; if the additional mail pay did not accrue in 1940, interest in the aggregate amount of $75,363.15 was due. (R. 23, 54.) This interest was paid by the taxpayer under protest to the Collector of Internal Revenue and the instant suit was brought after denial of a claim for refund.[1] (R. 54-55.)

The District Court held that, under the rule of *Continental Tie & L. Co. v. United States*, 286 U.S. 290, the right to the additional payments accrued in the years the transportation was furnished, after enactment of the Civil Aeronautics Act of 1938. (R. 80.) The Court of Appeals reversed, holding that, under the *Continental Tie & L. Co.* rule, the right to the additional

[1] The suit was brought against the estate of the Collector of Internal Revenue to whom the payment was made. (R. 9.) The appeal was taken by the United States as "defendant" (R. 82), hence the caption of the appeal in the court below, "United States of America v. Delta Air Lines, Inc."

pay did not accrue until the determination of just and reasonable rates of compensation was made by the Civil Aeronautics Board in 1942. (Pet. 17-20.)

ARGUMENT

The decision below correctly applies the established rule of law to the undisputed facts of the case. There is no conflict of decisions and no other occasion for further review.

1. The decision below is correct. The basic rule is that under Sections 41 and 42 of the 1939 Code (Appendix, *infra*, pp. 9-10) an item of income is accrued when the right to receive it has become final and definite in amount. *Security Flour Mills Co.* v. *Commissioner*, 321 U.S. 281. The decision in *Continental Tie & L. Co.* v. *United States*, *supra*, prescribed the test for fixing the date of accrual in the situation where taxpayer's rights await a determination by a Governmental agency. In such a case, the item accrues without formal agency determination where the measure of payment to be received by the taxpayer is fixed by the statute and the amount can be reasonably ascertained upon the basis of information in the possession of the taxpayer. In *Continental Tie & L. Co.*, the statute flatly provided that any railroad taken over by the Government in World War I was vested with a right to reimbursement by the Government for any ensuing deficits in its operation. The amount of the deficit was established by the carriers' own records and accordingly the Court held (p. 296):

> * * * the taxpayer had in its own books and accounts data to which it could apply the calculations required by the statute and ascertain the *quantum* of the the award within reasonable limits.

In the case at bar, the rule of *Continental Tie & L. Co.*, as the court below correctly noted (Pet. 20), requires the conclusion that the taxpayer's right to additional pay did not accrue until the determination of the Board fixing fair and reasonable rates and the effective date of the new rates. The Civil Aeronautics Act (see Section 406, *infra*, pp. 10-11) does not provide any definite measure of compensation or fix effective dates; it leaves the determination of rates to the expert judgment of the Board, subject to review by the courts. *Delta Air Lines, Inc.* v. *Summerfield*, 347 U.S. 74. Taxpayer concededly made no effort to estimate what rate would be fixed under the Act; instead, it accrued pay at the existing rate and simply awaited the determination of the Board.

Reference to the opinion of the Board (R. 94-131) quickly dispels the suggestion that its determination was a mere ministerial duty. Before reaching its judgment as to the fair and reasonable rates needed to compensate the carrier for transportation of mail and, with its other revenues, to assure the maintenance and development of an adequate air transportation system for commerce, postal service, and defense of the United States, the Board analyzed existing rate schedules, reviewed the carrier's equipment program, decided what items were to be included in operating income, what adjustments should be made in depreciation charges, and what effect was to be given operating losses on a segment of the route. Moreover, there was no possible way by which the taxpayer could tell in advance what effective date the Board would consider proper if it decided to fix a new rate.

In similar circumstances, i.e., where the amount of an award is dependent upon the exercise of adminis-

trative judgment, the courts have uniformly held that the right to income does not accrue until the judgment is made. *Midwest Motor Express* v. *Commissioner*, 251 F. 2d 405 (C.A. 8th), pending on petition for writ of certiorari,[2] No. 359, this Term; *Sharp* v. *Commissioner*, 224 F. 2d 920 (C.A. 6th); *New York Cent. R. Co.* v. *Commissioner*, 79 F. 2d 247 (C.A. 2d), certiorari denied, 296 U.S. 653; *Patrick McGuirl, Inc.* v. *Commissioner*, 74 F. 2d 729 (C.A. 2d), certiorari denied, 295 U.S. 748; *Breeze Corporations* v. *United States*, 117 F. Supp. 404 (C.Cls.); *H. J. Heinz Co.* v. *Granger*, 147 F. Supp. 664 (W.D. Pa.). Since *Continental Tie & L. Co.*, the Courts of Appeals have had no difficulty in distinguishing the situation where the statute fixes the measure of compensation to be paid and where that measure may be applied by the taxpayer on the basis of information in his possession. *Commissioner* v. *Dumari Textile Co.*, 142 F. 2d 897 (C.A. 2d); and see *Dally* v. *Commissioner*, 227 F. 2d 724 (C.A. 9th), certiorari denied, 351 U.S. 908.

2. There is no conflict of decisions. As already noted, the Court of Appeals correctly applied the rule of *Continental Tie & L. Co.* And there is no merit in the suggestion (Pet. 8-11) that there is conflict with cases involving the accrual of reserves by automobile dealers.

The question presented in the automobile-dealer "reserve" cases is whether an accrual basis taxpayer who sells property and receives part of his gain on the sale in cash and part in the form of a credit from a finance company—the latter portion to be ultimately satisfied either by payment in cash or by offset against the taxpayer's obligations—is required to report the amount of gain

[2] The petition in *Midwest Motor* was filed on other grounds.

so credited (as well as the gain in cash) as income for the year in which the credit is made. See the Government's petition for certiorari in *Commissioner* v. *Hansen*, No. 380, October Term, 1958.

The instant case and cases such as *Hansen* are alike only in that both involve application of the same underlying principle, (a principle well settled and not in dispute in either case), i.e., that income accrues when the right to receive it becomes final and definite in amount. That principle applies, of course, to a wide variety of unrelated transactions. It is apparent that the transactions involved in dealer "reserve" cases are wholly unrelated to those in the case at bar. When rights become final as between seller and finance company under arrangements peculiar to installment buying certainly sheds no light on the issue when this taxpayer became entitled to a final and definite award of mail pay.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General,
MELVA M. GRANEY,
JOSEPH KOVNER,
Attorneys.

OCTOBER, 1958.

[3] The court below did not, as taxpayer contends (Pet. 6), base its decision upon *Texas Trailcoach* v. *Commissioner*, 251 F. 2d 395 (C.A. 5th), a case involving dealer reserves; it merely cited that case (Pet. 19) for the underlying rule.

APPENDIX

Internal Revenue Code of 1939:

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

(26 U.S.C. 1952 ed., Sec. 41.)

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

(a) [As amended by Sec. 114 of the Revenue Act of 1941, c. 412, 55 Stat. 687] *General Rule.* The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his

death if not otherwise properly includible in respect of such period or a prior period.

* * * * *

(26 U.S.C. 1952 ed., Sec. 42.)

Civil Aeronautics Act of 1938, c. 601, 52 Stat. 973:

Sec. 405. (a) Each contract between the United States and any person for the carriage of mail, entered into or continued under the provisions of the Air Mail Act of 1934, as amended, and each contract for the carriage of mail by aircraft in Alaska, shall be continued in effect until canceled in accordance with this subsection. Each such contract shall be canceled upon the issuance to the holder of such contract of a certificate of public convenience and necessity authorizing the transportation of mail by aircraft between the points covered by such contract, or upon the failure of the holder of such contract to apply for such certificate within one hundred and twenty days after the date of enactment of this act, or upon a determination by the Authority that such certificate should not be issued. Until the Authority fixes rates under section 406 of this Act, the Postmaster General shall pay compensation for the transportation of mail by aircraft at the rates provided by each such contract or, where rates have been heretofore or shall hereafter be fixed by orders of the Interstate Commerce Commission, pursuant to proceedings instituted prior to the date of enactment of this Act, shall pay compensation for such transportation in accordance with such orders as if this Act had not been enacted.

* * * * *

(49 U.S.C. 1952 ed., Sec. 485.)

SEC. 406. (a) The Authority is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

(b) In fixing and determining fair and reasonable rates of compensation under this section, the Authority, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Authority shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service

for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

* * * * *

(49 U.S.C. 1952 ed., Sec. 486.)

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